

Internal Revenue Service

Number: **200930025**

Release Date: 7/24/2009

Index Number: 368.01-00, 483.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:CORP:B03

PLR-100693-09

Date:

April 22, 2009

Legend

Acquiring =

MergerSub =

Target =

Target Sub 1 =

Target Sub 2 =

Partnership 3 =

DE 4 =

DE 5 =

Business A =

Business B =

Business C =

State D =

State E =

State F =

R =

S =

U =

V =

W =

X =

Y =

m =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Dear :

This letter responds to your December 22, 2008 request for rulings on certain federal income tax consequences of a proposed transaction. Additional information was submitted in letters dated March 19, 2009, March 27, 2009, and April 15, 2009. The information submitted for consideration is summarized below.

Target, a State D holding company, is the common parent of an affiliated group of corporations filing a consolidated federal income tax return. Target owns all of the outstanding stock of Target Sub 1, a State E corporation, Target Sub 2, a State F corporation, and R percent (less than 80 percent) by value and S percent (less than 80 percent) by vote of Acquiring, a State E corporation. As of the closing date and taking into account the value of the membership interests in Partnership 3, the stock of Acquiring owned by Target will account for more than 80 percent by value of Target's assets. Target is owned U percent by m and V percent by the public.

Target Sub 1 is a member of the Target group and is engaged in Business A. Target Sub 2 is a member of the Target group and is engaged in Business B. Acquiring is the common parent of an affiliated group of corporations filing a consolidated federal income tax return. Acquiring is both a holding company and an operating company engaged in Business C.

For what are represented as valid business purposes, the following transactions have been completed or will take place:

- (i) On Date 2, Target formed Partnership 3 and Acquiring formed MergerSub. MergerSub is disregarded as an entity separate from its owner for federal income tax purposes.
- (ii) On Date 4, Target formed DE4 and DE5. DE4 and DE5 are each disregarded as an entity separate from its owner for federal income tax purposes.
- (iii) Effective on Date 5, Target Sub 1 merged with and into DE4 and Target Sub 2 merged with and into DE5 with DE4 and DE5 continuing as the surviving entities.
- (iv) On Date 6, Target contributed the majority of its assets, including 100 percent of the interests in DE4 and DE5, other than Acquiring shares, to Partnership 3 and Partnership 3 assumed all of Target's liabilities.

(v) On Date 7, Target distributed 100 percent of the membership interests in Partnership 3 pro rata to the Target shareholders.

(vi) On or prior to the closing date, Acquiring will amend its certificate of incorporation to increase the number of authorized shares of Acquiring Class A common stock to facilitate the issuance of shares in the Downstream Merger (described below), to increase the number of directors entitled to be elected by the holders of Acquiring common stock, and to provide for the conversion of the Acquiring Class A common stock into Acquiring common stock in certain events.

(vii) On the closing date, Target will merge into MergerSub, with MergerSub surviving the merger ("Downstream Merger"). In the Downstream Merger, Target's shareholders, on a pro rata basis, will receive in the aggregate, W percent of the number of shares of Acquiring Class A common stock and W percent of the number of shares of Acquiring common stock held by Target immediately prior to the Downstream Merger (collectively, the "New Acquiring Shares"), subject to reduction to avoid the issuance of fractional shares for which Target shareholders will receive cash. The New Acquiring Shares issuable in the Downstream Merger will be registered with the Securities and Exchange Commission ("SEC").

(viii) Following the consummation of the Downstream Merger, Acquiring will cause the cancellation of the shares of Acquiring Class A common stock and Acquiring common stock received by MergerSub in the Downstream Merger.

(ix) Y dollars of Acquiring common stock issued as merger consideration will be deposited into escrow for up to two years as indemnity protection for Acquiring and MergerSub (the "Escrow Arrangement").

(x) Pursuant to an Agreement and Plan of Merger among Acquiring, MergerSub, Target, and Partnership 3 dated Date 3, Acquiring will pay former Target shareholders an amount equal to the benefit actually derived by Acquiring from carry forwards of losses, deductions, and other items of Target attributable to periods prior to the closing date that are realized by Acquiring after the closing date and the amount of any tax refunds or credits received by Acquiring after the closing date that relate to pre-closing tax periods of Target ("Tax Benefit Sharing Agreement"). The former Target shareholders may receive more than one payment, and payments may be paid both within the first twelve months after the Downstream Merger and after the first twelve months.

REPRESENTATIONS

The following representations have been made regarding the proposed transaction:

- (a) Prior to and following the Downstream Merger, Acquiring will own the sole membership interest in MergerSub. There is no plan or intention for MergerSub to issue additional membership interests in MergerSub. MergerSub has no plan or intention to elect to be treated as an association.
- (b) The fair market value of the New Acquiring Shares and other consideration, if any, received by Target shareholders will be approximately equal to the fair market value of the Target stock surrendered in the exchange.
- (c) Taking into account the membership interests in Partnership 3 and the cash, if any, paid to the former Target shareholders pursuant to the Tax Benefit Sharing Agreement, at least 40 percent of the proprietary interest in Target will be exchanged for New Acquiring Shares and will be preserved within the meaning of § 1.368-1(e)(1)(i) of the Income Tax Regulations.
- (d) During the five-year period ending on the closing date: (1) neither Acquiring nor any person related to Acquiring within the meaning of § 1.368-1(e)(4) has acquired any Target stock for consideration other than Acquiring stock; (2) neither Target, nor any person related within the meaning of § 1.368-1(e)(4) determined without regard to § 1.368-1(e)(4)(i)(A) to Target, will have acquired or redeemed Target stock with consideration other than Acquiring stock or Target stock; and (3) except for the membership interests in Partnership 3, Target has not made any distributions with respect to its stock other than normal, regular dividend distributions made pursuant to Target's historic dividend paying practices, either directly or through any transaction, agreement or arrangement with any other person.
- (e) Acquiring has no plan or intention to reacquire, directly or through a related person (within the meaning of § 1.368-1(e)(4)), any of the New Acquiring Shares issued in the transaction. Acquiring has an existing stock repurchase program (the "Stock Repurchase Program") which was adopted on Date 1 and was not a matter negotiated by the parties in connection with the Downstream Merger. Acquiring will only make purchases pursuant to the Stock Repurchase Program on the open market, in order to comply with the SEC's safe harbor, and in such instances will not have any knowledge whether the repurchased shares were attributable to a sale of such Acquiring shares by a former Target shareholder.
- (f) Acquiring has no plan or intention to sell or otherwise dispose of any of the assets of Target acquired in the transaction, except for the cancellation of the Acquiring shares.
- (g) The liabilities of Target assumed by MergerSub, if any, and the liabilities to which the transferred assets of Target are subject, if any, were incurred by Target in the ordinary course of its business.

- (h) Target will reimburse Acquiring for all reasonable expenses in excess of X dollars incurred by Acquiring in connection with the transaction. Target and its shareholders will pay their respective expenses, if any, incurred in connection with the transaction. Partnership 3 will pay the reasonable expenses of the shareholder representative.
- (i) There is no intercorporate indebtedness existing between Acquiring and Target.
- (j) No two parties to the transaction are investment companies as defined in § 368(a)(2)(F)(iii) and (iv) of the Internal Revenue Code.
- (k) Target is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of § 368(a)(3)(A).
- (l) The fair market value of the assets of Target transferred to Acquiring will equal or exceed the sum of the liabilities, if any, assumed (as determined under § 357(d)) by Acquiring.
- (m) The terms of the Escrow Arrangement will satisfy the requirements of section 3.06 of Rev. Proc. 77-37, 1977-2 C.B. 568, as amplified by Rev. Proc. 84-42, 1984-1 C.B. 521, except that Y dollars of Acquiring common stock will be subject to the Escrow Arrangement.
- (n) The payment of cash in lieu of fractional New Acquiring Shares is solely for the purpose of avoiding the expense and inconvenience to Acquiring of issuing fractional shares and is not separately bargained for consideration. The total cash consideration that will be paid to Target shareholders in lieu of issuing fractional New Acquiring Shares will not exceed one percent of the total consideration that will be issued in the transaction to the Target shareholders in exchange for their shares of Target stock. The fractional share interests of each Target shareholder in New Acquiring Shares will be aggregated, and no Target shareholder will receive cash in an amount greater than the value of one full share of Acquiring Class A common stock and one full share of Acquiring common stock.
- (o) None of the compensation to be received by any shareholder-employees of Target will be separate consideration for, or allocable to, any of their shares of Target stock surrendered in the exchange; none of the New Acquiring Shares received by any shareholder-employees will be separate consideration for, or allocable to any employment agreement; and the compensation paid to any shareholder-employees will be for services rendered and will be commensurate with amounts paid to third parties bargaining at arm's length for similar services.

RULINGS

Based solely on the information submitted and the representations set forth above, we hold as follows:

1. For federal income tax purposes, the Downstream Merger of Target into MergerSub will be treated as the transfer of Target's assets and liabilities to Acquiring. Provided the Downstream Merger qualifies as a statutory merger under applicable state law, the Downstream Merger will qualify as a reorganization under § 368(a)(1)(A). Each of Target and Acquiring will be a "party to the reorganization" within the meaning of § 368(b). Section 1.368-2(b)(1).
2. Target will recognize no gain or loss on the transfer of its assets and liabilities in the Downstream Merger. Sections 361(a), 361(b)(1)(A), and 357(a).
3. Target will recognize no gain or loss on the distribution of Acquiring stock to its shareholders. Section 361(c).
4. Target will recognize gain, but not loss, on the distribution of the membership interests in Partnership 3 as if such property were sold to the Target shareholders at their fair market value.
5. Acquiring will recognize no gain or loss on the deemed receipt of Target's assets and liabilities in exchange for New Acquiring Shares in the Downstream Merger. Section 1032.
6. Acquiring's basis in the assets deemed received from Target in the Downstream Merger will be the same as Target's basis in such assets. Section 362(b).
7. Acquiring's holding period for the assets deemed received from Target in the Downstream Merger will include Target's holding period for such assets. Section 1223(2).
8. A portion of any cash received by a Target shareholder under the Tax Benefit Sharing Agreement is taxable as unstated interest under § 483 in the year of receipt. See § 1.483-4 to determine the amount of unstated interest. (Notwithstanding the first sentence of this Ruling 8, § 483 will not apply if the only payment under the Tax Benefit Sharing Agreement is made within one year of the Downstream Merger). For purposes of this letter ruling, the portion of the cash received, if any, by a Target shareholder under the Tax Benefit Sharing Agreement that is not taxable as unstated interest under § 483 shall be referred to as "Tax Benefit Sharing Cash Boot" or "TBSCB." No portion of the New

Acquiring Shares deposited into escrow is taxable as unstated interest under § 483. See Rev. Rul. 70-120, 1970-1 C.B. 124.

9. Gain will not be recognized by a Target shareholder on the exchange of Target stock for New Acquiring Shares (including the New Acquiring Shares deposited into escrow and any fractional shares to which the shareholder may be entitled), except to the extent of any TBSCB and other property (other than New Acquiring Shares) received by the Target shareholder. The amount of gain that is recognized shall not exceed the amount of the TBSCB and the fair market value of other property (other than the New Acquiring Shares) received in the exchange. Section 356(a)(1). The TBSCB shall be taken into income in the year it is received by the shareholder. If the exchange has the effect of the distribution of a dividend (determined with the application of § 318(a)), then the amount of the gain recognized that is not in excess of the Target shareholder's ratable share of undistributed earnings and profits will be treated as a dividend. Section 356(a)(2). No loss will be recognized pursuant to 356(c).

10. The total basis of the New Acquiring Shares received by a Target shareholder (including the New Acquiring Shares deposited into escrow and any fractional shares to which the shareholder may be entitled) will be the same as the basis in the Target stock exchanged therefor, decreased by the amount of the TBSCB and the fair market value of other property received by the Target shareholder in the exchange, and increased by the amount, if any, received in the exchange which was treated as a dividend and increased by the amount of gain recognized in the exchange (not including any portion of the gain treated as a dividend). Section 358(a)(1).

11. A Target shareholder's holding period for the New Acquiring Shares received (including the New Acquiring Shares deposited into escrow any fractional shares to which the shareholder may be entitled) will include the period during which the shareholder held the Target stock exchanged therefor, provided the shareholder held the stock as a capital asset on the date of the exchange. Section 1223(1).

12. The payment of cash in lieu of issuing fractional shares of Acquiring stock will be treated as if the fractional shares were issued in the Downstream Merger and then redeemed by Acquiring with the cash payments treated as having been received as distributions in full payment in exchange for the redeemed fractional shares as provided in § 302(a). Provided the fractional share interest is a capital asset in the hands of the recipient shareholder, the gain or loss will constitute capital gain or loss subject to the provisions and limitations of Subchapter P of Chapter 1. Rev. Rul. 66-365; 1966-2 C.B. 116; Rev. Proc. 77-41, 1977-2 C.B. 574.

13. Acquiring will succeed to and take into account Target's items described in § 381(c) subject to the conditions and limitations specified in §§ 381, 382(b), 383 and 384 and the regulations thereunder. Section 381(a); § 1.381(a)-1.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. No opinion is expressed whether the membership interests in Partnership 3 constitute other property received in the exchange.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Ken Cohen
Acting Chief, Branch 3
Office of Associate Chief Counsel
(Corporate)